No. 26.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

FRANCISCA L. DE MARTIN, *Appellant*,

v

JAMES PHELAN, *Appellee*.

PETITION FOR RE-HEARING

GEORGE D. COLLINS,

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Filed July ..... *1892.*

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.....*Clerk.*

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v.
JAMES PHELAN,
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PETITION FOR RE-HEARING.

To the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, and to the Judges thereof:

The appellant herein respectfully petitions for a re-hearing of this cause and upon the following grounds, viz:

I.

The Court is undoubtedly in error in ruling that the deed from appellant to appellee is not to be held a mortgage simply because it was intended as a deed.

Under the circumstances narrated in the bill of complaint, the deed was in legal effect and by construction of Equity nothing but a mortgage; true, it was not a conventional mortgage, nor need it be such to entitle the plaintiff to maintain a bill to redeem; it is enough if the circumstances are such as to render applicable that doctrine of Chancery which holds a deed of the equity of redemption, made for an inadequate consideration by a necessitous debtor to his mortgagee, constructively a mortgage,—not because the parties so intended, but because it is essential that the transaction be so considered in order that Equity may make effective its principle governing the subject. To all intents and purposes, the deed intended by the parties as a conveyance is just as much a mortgage as though it purported to be such on its very face. It is upon that ground alone that *bills to redeem* have been entertained and sustained, notwithstanding the fact that the deed in question was intended to be an absolute conveyance of the title, and no attempt was ever made or even suggested that the deed first be set aside, rescinded or cancelled as such; but in every case the Court proceeded and granted the relief on a bill to redeem and simply considered the deed a mortgage, although the parties had no such intention at the time of its execution. And this practice is in strict accord with the principles of equity in analogous cases; in fact, it is a part of the history of equity jurisprudence, that when a debtor executed an absolute deed to his

creditor in payment of his indebtedness or as security for its payment, although it was intended that the title should vest absolutely in the creditor, the Court of chancery held it to be but a mortgage and permitted a redemption despite the deed, even going so far as to hold that parol evidence was admissible to show the facts. It is hardly necessary, however, to advert to analogous cases to show that no matter what may be the intention of the parties, if the transaction is such as to come within the equitable doctrine of constructive mortgage, a redemption will be decreed without rescission or cancellation of the instrument intended as an absolute conveyance. The instrument is not disregarded, but its effect is restricted to that of a mortgage, and to all intents and purposes it is just as complete a mortgage as though it was entirely conventional and is to be given the same judicial recognition as though it purported on its face to be a mortgage and not a deed. If, then, the instrument before the Court—the deed of November 4, 1881—was a formal mortgage, it at once becomes impressively obvious that the doctrine of rescission which dominates the opinion of the Court, together with the inferential theory of laches which rests upon it, would have no more place in the case than the statute *De Donis Conditionalibus*. Nor is the argument even plausible, that the defendant was entitled to know whether the plaintiff elected to treat the deed as a mortgage ; he is presumed to know the law, and having purchased under the facts narrated in

the bill, the doctrine of *caveat emptor* applies to him (*Christy v. Sullivan*, 50 Cal., 339), and he cannot be heard to say that he speculated on the possibility of the plaintiff reserving her objection until it was too late to urge it. He cannot be permitted to convert what equity deems a mortgage into a deed absolute. "Once a mortgage, always a mortgage," is one of the elementary principles of equity jurisprudence, and no Court of Chancery would be loyal to the fundamental law of its being, did it permit the mere lapse of time to have the magic effect of transforming a mortgage into a deed. Before the advent of the decision in this case, it was never held that a period of ten years would bar the right to redeem. The limit prescribed was *twenty years*, and laches were never predicated on a shorter period. (*Jarvis v. Woodruff*, 22 Conn., 548; *Hughes v. Edwards*, 9 Wheat., 489; *Slicer v. Bank of Pittsburg*, 16 How., 571; *Kinna v. Smith*, 3 N. J. Eq., 16.) And it is therefore quite impossible to understand why *laches* should be found to exist in this case, as the suit was entered *eight* years and *ten* months after the day on which the transaction was had and the deed executed. The Court is entirely in error, in asserting the period to be nearly ten years, and even if it was, on the point of laches, that would not be an unreasonable length of time, as is manifest from the authorities just cited. The Court cites *Twin Lick Oil Co. v. Marbury*, 91 U. S., 592, in support of its views; but that case is differentiated from this by the charac-

ter of the property there involved, the fluctuating character of which is expressly referred to by the Court as the basis of its ruling; and besides, the Court states explicitly that the rule it there applied would have no application to a case where real estate was the subject matter of the litigation. Again, that was not a case of a mortgage, for that is *sui generis* and stands on its own peculiar basis. There, too, the doctrine of rescission was resorted to, on the point of laches; whereas in this case, that doctrine has no relevancy to the case, as we have already seen. In that case there existed an option to avoid the conveyance, and it was necessary to exercise that option, and, upon that theory, the defense of laches was sustained; in this case, there never was an option and no necessity of exercising one, as the transaction was a mortgage *ab initio*, by construction of law. The Marbury case was one of fraud; this case is not, and only incidentally involves the issue of undue influence. In short, if this case is viewed in the light of the authorities holding the transaction to be a mortgage, then all doubts vanish and the right of the plaintiff to redeem becomes clearly established; and if the Court will determine the question of laches as applied to the right to redeem from a mortgage—the only proper method of deciding the question—it will readily perceive the error of its ruling in affirming the decree on the ground of laches.

We will now refer the Court to some of the author-

ities supporting this, the first ground of our position. That the mortgagor knowingly surrendered, transferred the property and never intended to reclaim, is of no consequence in a case of this nature, was expressly so adjudged in the parallel case of *Villa v. Roderiguez*, 12 Wall., 339, where that very language was used in deciding the point.

That the deed is in legal effect but a mortgage and a bill to redeem may be maintained without rescinding or cancelling it, is apparent from the following authorities :

Holridge *v.* Gillespie, 2 Johns. Ch., 30, per Kent, J ;
Shekel *v.* Hopkins, 2 Md. Ch., 90 ;
Dougherty *v.* McColgan, 6 Gill & J., 275 ;
Goodman *v.* Pledger, 14 Ala., 118 ;
Perkins *v.* Drye, 3 Dana, 117 ;
Villa *v.* Roderiguez, 12 Wall. ;
2 Jones on Mortgages, § 1,046,

II.

The Court is in error in stating that nine years and ten months elapsed prior to the entry of suit. The deed was executed November 4, 1881, and this suit entered September 16, 1890, a period of eight years and ten months ; deducting the four years of defendant's absence from the State, leaves a period of four years and ten months.

III.

The Court erred in disregarding the State statute of limitations and in resorting to the doctrine of laches in its stead.

If the statute of limitations governs the case, the doctrine of laches has no application. In the case of *Norris v. Haggin*, 12 Sawyer, 51, 52, the Court held that the United States Courts sitting in equity were in duty bound to apply the State statute of limitations, and cited many cases to show that such is the law as declared by the national Supreme Court, and the case is the more pertinent in view of the fact that Sawyer, J., confessed that he was mistaken in asserting the law to be precisely what it is declared to be by this Court in the case which is the subject of this petition.

In support of our position that the State statute governs the case, in addition to the authority just cited, we refer the Court to the cases of *Cross v. Allen*, 141 U. S., 537 ; *Michoud v. Girod*, 4 How., 561 ; *Manning v. Hayden*, 5 Sawyer, 380. It would be strange indeed if this case would be governed by the State statute of limitations, and not by the doctrine of laches, if it had been instituted in the State Court, and conversely by the doctrine of laches and not the statute of limitations when entered in the Federal Courts. Such a conflict of law would tend very much to disturb the constitutional harmony of the two governments

and subject the rights of litigants to the disposition of two sets of laws, the one directly opposed to the other.

Nor do the cases cited by this Court in support of its views at all militate against our position. The case of *Twin Lick Oil Co. v. Marbury*, 91 U. S., 592, was determined upon a state of facts that excluded the possibility of a State statute of limitations. The case went to the Supreme Court from the *District of Columbia*, and the Court was not therefore in any respect concerned with the statute of limitations. The question of lapse of time had to be determined by the Court from "the inherent principles of its own system of jurisprudence, and to decide accordingly," for it had no other guide. Say the Court: "We are but little aided by the analogies of statutes of limitation"; that is, by statutes of limitation *generally*. If the case had originated in one of the States, where there was a statute of limitation applicable to the subject, the decision of the Court would clearly have enforced the prescription of the statute; but there being no such statute, the Court could not derive an analogy from "statutes (plural) of limitation" generally, and hence, of necessity, had to apply "the inherent principles of its own system of jurisprudence." Under no proper consideration of the case can the ruling in *Twin Lick Co. v. Marbury* be held applicable.

Nor is the case of *Sullivan v. Portland R. R. Co.*, 94 U. S., 811, an authority in support of the opinion and decision of this Court. The Court did not there

hold that the statute of limitations did not bind a United States Court sitting in equity, but it was held that the statute could not be considered as it had not been properly plead ; if that objection had not existed, it is very clear from the Court's opinion that the statute would have governed the case, and not the equity doctrine of laches. As there was no other guide, the Court was compelled to "apply the inherent principles of its own system of jurisprudence and to decide the case accordingly ;" a thing it would not have done had the statute of limitations been before the Court. This is the interpretation given the case in *Norris v. Haggin*, 12 Sawyer, 47, and is undoubtedly the correct one.

Applying, then, the State statute of limitation to the case, and giving full effect to the argument presented herein under our first ground for a re-hearing, the deed of November 4, 1881, must be held to be to all intents and purposes *a mortgage*, and turning to section three hundred and forty-six of the Code of Civil Procedure of California, we find a specific limitation in respect to the right to redeem from a mortgage, where the mortgagee is in possession, and that period is five years ; and again referring to section three hundred and fifty-one of the same Code, we find that "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term * * * limited, after his return to the State, *and if, after the cause of action accrues, he departs from*

the State, the time of his absence is not part of the time limited for the commencement of the action." (44 Cal., 280). And the Supreme Court of the State has held that successive absences are to be aggregated and then deducted from the statutory limitation (*Rogers v. Hatch*, 44 Cal., 280.)

Applying that law to this case, and deducting the four years of defendant's absence from the period that has elapsed intermediate the time of the execution of the deed and the commencement of this suit, and the result is, *four years and ten months ;* which brings the case within the statutory period of five years (§ 346, C. C. P.), by two months.

As we have shown, the Court is bound to apply the limitation prescribed by the State statute, and that necessarily excludes the doctrine of laches. As pointed out in *Norris v. Haggin*, 12 Sawyer, 51, 52, the State statute applies to all cases both at law and in equity, and is obligatory on the Federal Courts of equity *proprio vigore* in cases of concurrent jurisdiction, and by analogy in cases of exclusive jurisdiction in equity. If the statute only applied to cases at law, then it could only apply by analogy to cases of concurrent jurisdiction in equity, but as it applies to cases in equity as well as at law, it is equally applicable by analogy to cases within the exclusive jurisdiction of Courts of equity (*Norris v. Haggin*, 12 Sawyer, 51, 52), sitting in the Federal jurisdiction.

It is quite clear, therefore, that the Court erred in

applying the doctrine of laches to the case; for first, ten years, or any period short of twenty years, has never been held to bar the right to redeem; and secondly, the statute of limitations alone governs the subject and establishes the plaintiff's right to maintain the suit, and the doctrine of laches does not pertain to the case or to any case where the statute of limitations governs either *proprio vigore* or by way of analogy. (*Cross v. Allen*, 141 U. S., 537.)

IV.

The Court is in error in stating that "plaintiff's counsel attempts to distinguish between a right to regard the instrument as a mortgage and a right to regard it as a deed and to rescind it, admitting in the latter case that Section 343 of the Code of Civil Procedure controls and the plaintiff is guilty of laches." Plaintiff's counsel never at any time admitted that plaintiff was guilty of *laches*, but, on the contrary, strenuously opposed such a proposition at all times; what counsel did concede was this: that if a *rescission* was necessary, Section 343 of the Code applied to the case; but we have always contended and still maintain that, both upon principle and authority, no rescission is necessary or even proper; that the deed is in legal effect but a mortgage—a constructive mortgage, 't is true—but a mortgage just as completely as though it had been so agreed by the parties. We will not repeat the discussion of this question here, but will refer the Court

to the points and authorities to be found under the first ground hereinbefore presented as one of the reasons why a re-hearing should be granted.

V.

This Court had before it the opinion of the Circuit Court on the order sustaining the demurrer. That opinion is to be found in the brief of the appellee, and it indicates that the demurrer was not susta ned on the ground of *laches;* if it had been, the appellant would have amended and shown satisfactory reason for the delay ; as she was not cognizant of her rights until within a short period preceding litigation, and she then presented her objections to the State Courts in an action instituted against her by the appellee ; but those objections were not passed on by the State Courts, and she thereupon instituted a suit on her own behalf in the Federal Courts. She relied on the opinion of the Circuit Court in electing not to amend, as she could not by amendment improve her case so as to meet the objection sustained by that Court, and she thereupon appealed for the purpose of securing redress, and now the appellate Court, instead of passing upon the ground on which the lower Court sustained the demurrer, entirely ignores it, and rules upon another and entirely different ground, that must be held to have been resolved in favor of the appellant by the Court below, and upon that basis affirms the judgment! We respectfully submit that this course is most unfair to a

litigant, and while we can readily appreciate that the reasoning of a Court is no part of its decision, yet the ground upon which it sustains a demurrer is of the very essence of the decision, and is wholly independent of the reasoning which led to its support ; and it seems to us that it is an exercise of original and not of appellate jurisdiction for a Court of review to affirm a judgment rendered on demurrer upon a ground which had been virtually ruled in favor of the appellant by the Court below—at all events, upon a ground of demurrer entirely different from that upon which the judgment was based by the Court which rendered it. The plaintiff has certainly been misled by the decision of the lower Court, if the appellate Court finally disposes of the case upon a ground essentially different from that on which it was decided in the Court below, and which might have been obviated by the plaintiff had it not been virtually ruled in her favor by the Circuit Court.

We respectfully submit that there is nothing in the bill to show that the defendant has been injured by the lapse of time, or that he is in any worse position now than he was the very next day after the transaction, and therefore, even if the doctrine of laches did control, it should not be applied in this case, since the mere lapse of time can never at law or in equity destroy a right, unless of course, it be found in a statute of limitations—an entirely different matter from laches. The burden is on the defendant to show that he has

been injured by the lapse of time, and there is no such showing in this case. Indeed it has been stated to be one of the maxims of Chancery that "Length of time no objection in Equity to redemption" (Barton's Digest of Legal Maxims, p. 284).

Above all, it must be laid down with emphasis that it is not only unnecessary but improper to rescind, or set aside, or cancel the deed of November 4, 1881, for under the authorities hereinbefore cited, in the eyes of the law, that instrument is constructively a *mortgage.* As was said in *Villa v. Rodericguez*, 12 Wallace, 323, *per Curia*, in respect to a similar instrument: "The law upon the subject of the *right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption* is characterized by a jealous and salutary policy * * * *The form of the instrument is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim, is of no consequence.*"

Thus this Court must perceive its error in disposing of the case upon the theory that the instrument of November 4, 1881, is a deed, and that it is necessary to rescind or cancel it before the plaintiff's right to redeem can become established, and that defendant had the right to know whether it was to stand as a deed or a mortgage. It never was a deed, and as the defendant was a party to the transaction, he must be held to have known *ab initio*, that the instrument was nothing more than a *mortgage*, from which the plaintiff had the right to redeem, and that by virtue of Section 346 of the Code of Civil Procedure of California, that right could

be exercised at any time before he acquired a title by adverse possession (*Hall v. Arnott*, 80 Cal., 355, 356).

The Court seems to overlook the fact that this is a *bill to redeem*, and therefore that no other limitation is applicable to the case than that pertaining to bills of redemption. Rescission, cancellation, annullment and revocation are all essentially foreign to the case, and a reference to either of them is not only erroneous but positively misleading.

We respectfully submit that upon principle and authority, and, upon the very justice of the case, the appellant is entitled to a re-hearing and she respectfully petitions the Court that such be its order.

FRANCISCA L. DE MARTIN,
Petitioner.

GEORGE D. COLLINS,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Northern District of California. } ss.

This is to certify that I, George D. Collins, an attorney and counsellor of the United States Circuit Court of Appeals for the Ninth Circuit, and of the Supreme Court of the United States of America, have duly, carefully and diligently examined the foregoing petition for a re-hearing, and that I believe it to be well founded in point of law and of fact.

In Witness Whereof, I have hereunto set my hand this 28th day of July, A. D. 1892.

GEORGE D. COLLINS,
Counsel for Petitioner.